STATE OF MICHIGAN

COURT OF APPEALS

HARRY RONALD FRANS, d/b/a RAINBOWS END, Plaintiff/Counter-Defendant-Appellant,	UNPUBLISHED September 23, 2008
v	No. 280173 Schoolcraft Circuit Court
HARLEYSVILLE LAKE STATES INSURANCE COMPANY, Defendant/Counter-Plaintiff-Appellee.	LC No. 03-003376-CK

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Plaintiff brought this action to recover insurance proceeds after a fire damaged plaintiff's business property. In a prior appeal, this Court reversed the trial court's order denying defendant's request for an appraisal and remanded for the commencement of appraisal proceedings. *Frans v Harleyvsille Lake States Ins Co (On Rehearing)*, 270 Mich App 201; 714 NW2d 671 (2006). Thereafter, an appraisal award was issued for $444,018. Defendant timely paid plaintiff $434,709, which it asserted was the maximum amount permitted under plaintiff's policy limits. Plaintiff then filed a motion requesting a money judgment for the unpaid amount of the appraisal award, as well as pre-suit and statutory interest, taxable costs, and penalty interest. The trial court denied plaintiff's motion, and plaintiff appeals. For the reasons set forth below, we reverse the trial court's denial of penalty interest under MCL 500.2006 and remand for a determination of penalty interest, but affirm in all other respects.

I. Judgment

Plaintiff argues that the trial court erred when it refused to enter a judgment for the unpaid amount of the appraisal award. We disagree.

Defendant fully paid the appraisal award to the extent of its policy limits. The appraisers awarded $26,709 for building debris removal, but defendant paid only $18,000 in accordance with the policy limits. Although the appraisers properly could determine the amount of plaintiff's loss for debris removal, they could not alter the applicable policy limits under the parties' insurance policy. *Lentz v Lentz*, 271 Mich App 465, 471; 721 NW2d 861 (2006).

Under paragraph 5.A(2) of the parties' policy, the coverage limit for debris removal was 25 percent of the amount paid for covered business personal property and the applicable deductible. Defendant paid $122,000 for business personal property loss (pursuant to the appraisal award) and the deductible was $500. Twenty-five percent of the sum of these two amounts ($122,000 and $500) is $30,625. However, the policy limit for business personal property was $135,000. Because defendant had paid $122,000 for business personal property loss, that left only $13,000 for debris removal. Under paragraph 5.A(4)(a), however, plaintiff was entitled to an additional $5,000 because the sum of direct physical loss ($122,000) and the debris removal expense ($26,709) exceeded the $135,000 policy limit. Therefore, notwithstanding the appraiser's award of $26,709 for debris removal, defendant was liable only to the extent of its policy limit, that being $18,000, which defendant paid.

We reject plaintiff's argument that defendant waived its right to contest the scope of the policy's coverage. As explained in *Fitzgerald v Hubert Herman, Inc*, 23 Mich App 716; 179 NW2d 252 (1970),

> [t]o constitute a waiver, there must be an existing right, benefit, or advantage, knowledge, actual or constructive, of the existence of such right, benefit, or advantage, and an actual intention to relinquish it, or such conduct as warrants an inference of relinquishment. There must be an existing right and an intention to relinquish it, and there must be both knowledge of the existence of a right and an intention to relinquish it.
>
> A waiver exists only where one, with full knowledge of material facts, does or forbears to do something inconsistent with the existence of the right in question or his intention to rely on that right.
>
> A waiver may be shown by proof of express language of agreement or inferably established by such declaration, act, and conduct of the party against whom it is claimed as are inconsistent with a purpose to exact strict performance. [Citations and internal quotations omitted.]

By merely requesting an appraisal, defendant did not waive any issue concerning the extent of coverage for debris removal, particularly considering that defendant expressly reserved its rights under the policy.

Defendant also did not pay the appraisal award of $600 for valuable papers. However, that award was conditioned upon plaintiff's obligation to "give [defendant] the currency debris in his possession or see what credit will be given for it at a bank and give that credit to [defendant]." Plaintiff never satisfied this condition and, therefore, he was not entitled to the $600 award.

It is undisputed that defendant timely paid the balance of the appraisal award. Having done so, and because plaintiff was not entitled to any additional amount for debris removal and failed to satisfy the condition precedent for the $600 valuable papers award, there was no basis for issuing a money judgment for all or any portion of the appraisal award. See *Griswold Properties, LLC v Lexington Ins Co*, 275 Mich App 543, 570; 740 NW2d 659 (2007) ("*Griswold*

I"), vacated in part on other grounds 275 Mich 801 (2007), superceded in part by a special conflict panel at 276 Mich App 551 (2007).

Contrary to what plaintiff argues, the trial court did not improperly modify the appraisal award by refusing to enter a judgment. See *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 399; 605 NW2d 685 (1999); *Emmons v Lake States Ins Co*, 193 Mich App 460, 466; 484 NW2d 712 (1992). Rather, the court enforced the award according to its terms and the parties' policy limits, and properly determined that the award had been timely and fully paid. Thus, a money judgment was not necessary.

II. Common Law and Statutory Interest

We hold that the trial court did not err when it denied plaintiff's request for pre-suit, common-law interest. As this Court explained in *Krim v Commercial Union Assurance Co*, 94 Mich App 639; 288 NW2d 463 (1980),

> when the parties settle a good faith dispute over the amount of liability on a fire insurance claim through negotiation or resort to appraisal procedures provided for under the policy, interest is not available to the insured if the insurer pays the claim within thirty days of the ascertainment of the loss.

Here, the parties settled their dispute by resorting to the appraisal procedure provided for in the policy, and defendant timely paid the appraisal award within 30 days. Thus, plaintiff was not entitled to common-law interest.

Similarly, because defendant timely and voluntarily paid the appraisal award without challenging the award through court intervention, plaintiff was not entitled to statutory interest under MCL 600.6013. *Griswold I, supra* at 569-570, 575.

III. Costs

Plaintiff also argues that he was entitled to tax costs under MCR 2.625. We disagree. A signed judgment is a prerequisite for taxing costs under MCR 2.625(F). Here, the matter ultimately proceeded through the appraisal process and no judgment was entered. Further, in order to be considered the prevailing party for purposes of MCR 2.625, plaintiff was required to show that his position was improved by the litigation. *Citizens Ins Co of America v Juno Lighting, Inc*, 247 Mich App 236, 245; 635 NW2d 379 (2001). The appraisal process is a substitute for judicial determination of a dispute concerning the amount of a loss. *Auto-Owners Ins Co v Kwaiser*, 190 Mich App 482, 486; 476 NW2d 467 (1991). Because this matter was resolved through the appraisal process, not through judicial litigation, plaintiff was not a prevailing party for purposes of MCR 2.625. Therefore, the trial court properly refused to tax costs under MCR 2.625.

IV. Penalty Interest

We agree, however, that plaintiff is entitled to penalty interest pursuant to MCL 500.2006(4). Relying on *Arco Industries Corp v American Motorists Ins Co (On Second Remand, On Rehearing)*, 233 Mich App 143; 594 NW2d 74 (1998), the trial court denied

plaintiff's claim for penalty interest, concluding that a first-party insured is not entitled to penalty interest if a claim, after sufficient proof of loss, remains reasonably in dispute. Recently, however, a special panel of this Court resolved a conflict concerning the payment of penalty interest to first-party insureds under MCL 500.2006(4). In *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 554; 741 NW2d 549 (2007) ("*Griswold II*"), the Court held that "a first-party insured is entitled to 12 percent penalty interest if a claim is not timely paid, irrespective of whether the claim is reasonably in dispute."

Under MCL 500.2006(4), penalty interest begins to accrue 60 days after a satisfactory proof of loss. *Angott v Chubb Group of Ins Cos*, 270 Mich App 465, 485; 717 NW2d 341 (2006). An insured submits a satisfactory proof of loss by providing the documents and evidence required by the insurer to begin processing the claim. *Griswold I, supra* at 567. To properly reject a proof of loss, an insured must specify the materials that constitute a satisfactory proof of loss. *Id.* at 564; *Angott, supra at* 86. An insurer may not simply take the position that the insured has exaggerated its losses. *Griswold I, supra* at 564. If the insurer fails to adhere to this requirement, the insured is excused from submitting a satisfactory proof of loss, and it is assumed that a satisfactory proof of loss was submitted. *Id*. at 564-566.

Here, defendant notified plaintiff that it was rejecting his proofs of losses, but defendant never specified what materials were needed to constitute a satisfactory proof of loss. Therefore, it is assumed that plaintiff submitted a satisfactory proof of loss and penalty interest began to accrue 60 days after that submission.

Defendant argues that *Griswold II* should be given prospective application only. As explained in *Paul v Wayne Co Dep't of Pub Service*, 271 Mich App 617, 620-621; 722 NW2d 922 (2006):

> Generally, judicial decisions are given full retroactive effect, i.e., they are applied to all pending cases in which the same challenge has been raised and preserved. Prospective application of a judicial decision is a departure from the general rule and is only appropriate in exigent circumstances. Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law. The threshold question in determining the application of a new decision is whether the decision in fact clearly established a new principle of law. If that question is answered in the affirmative, then a court must weigh three factors in deciding whether a judicial decision warrants prospective application: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactive application on the administration of justice. [Citations and internal quotations omitted.]

There are no exigent circumstances here warranting that *Griswold II* be given only prospective application. *Griswold II* did not overrule clear and uncontradicted case law. Although earlier cases had decided the penalty-interest issue differently, those decisions were not clear and uncontradicted in light of our Supreme Court's decision in *Yaldo v North Pointe Ins Co*, 457 Mich 341; 578 NW2d 274 (1998), which had also rejected the "reasonable dispute" standard. Moreover, full retroactive application is appropriate where, as here, a special conflict panel overrules earlier precedent that is contrary to the clear language of a statute. *Zanni v Medaphis*

Physician Services Corp, 240 Mich App 472, 478; 612 NW2d 845 (2000). Therefore, we conclude that *Griswold II* applies to this case.

Accordingly, because benefits were not paid within 60 days after plaintiff's submission of satisfactory proof of loss, he was entitled to penalty interest under MCL 500.2006(4). We therefore remand this case for a determination of penalty interest under the statute.

Affirmed in part, reversed in part, and remanded for a determination of penalty interest under MCL 500.2006(4). We do not retain jurisdiction.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering